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5 **UNITED STATES DISTRICT COURT**  
6 **SOUTHERN DISTRICT OF CALIFORNIA**  
7

8 SEAN M. PARK; MICHELLE PARK,

9 Plaintiffs,

10 vs.

11 U.S. BANK NATIONAL  
12 ASSOCIATION; CREDIT SUISSE  
13 FINANCIAL CORPORATION;  
14 QUALITY LOAN SERVICE  
15 CORPORATION; OLD REPUBLIC  
16 TITLE COMPANY; SELECT  
17 PORTFOLIO SERVICING;  
18 MORTGAGE ELECTRONIC  
19 REGISTRATION SYSTEMS – “MERS”;  
20 BILL KOCH in his official capacity as  
21 assistant secretary to Mortgage Electronic  
22 Registration Systems and as document  
23 control officer for Select Portfolio  
24 Servicing; LENDER PROCESSING  
SERVICES, INC.; Auctioneer JAY  
GAFNER in his capacity as agent for  
Lender Processing Services, Inc.;  
SUNDANCE LLC; DANIEL GROIS,  
acting in his capacity as manager for  
Sundance LLC; and DOES individuals 1  
to 100, inclusive; and ROES corporations  
1 to 30, inclusive; and all other persons  
and entities unknown claiming any right,  
title, estate, lien, or interest in the real  
property described in the complaint  
adverse to Plaintiffs’ ownership, or any  
cloud upon Plaintiffs’ title thereto,

Defendants.

CASE NO. 10cv1546-WQH-WMc

ORDER

25 HAYES, Judge:

26 The matters before the Court are the Motions to Dismiss filed by Defendants Lender  
27 Processing Services, Inc. (“Lender Processing Services”), U.S. Bank National Association  
28 (“U.S. Bank”), Credit Suisse Financial Corporation (“Credit Suisse”), Select Portfolio

1 Servicing, and Mortgage Electronic Registration Systems (collectively, “moving Defendants”).  
2 (ECF Nos. 97, 100).

3 **I. Background**

4 On May 4, 2011, Plaintiffs, proceeding pro se, filed the “First Amended Verified  
5 Complaint” (“First Amended Complaint”), which is the operative pleading. (ECF No. 90).  
6 The First Amended Complaint alleges that, on August 15, 2007, Plaintiffs “entered into a  
7 contractual agreement ... borrowing \$840,000 from lender Credit Suisse Financial Corporation  
8 refinancing the real property commonly known as 7421-7423 Draper Avenue, La Jolla,  
9 California....” *Id.* at 2. “The core of this action arises out of a breach of contractual agreement  
10 between Plaintiffs ... and lender Defendant Credit Suisse Financial Corporation, followed by  
11 an invalid and flawed non-judicial foreclosure on the subject property, and subsequent  
12 wrongful and invalid assignments recorded on Subject Property title.” *Id.* at 2-3. The First  
13 Amended Complaint alleges that “[a]ll ... named Defendants participated in improperly  
14 alleging an incorrect debt of \$896,843.86 as owing on the subject property when Plaintiff only  
15 borrowed \$840,000, and faithfully performed all the required covenants of the Subject Loan  
16 Agreement making well over \$100,100 in timely payments until ... Defendants instructed and  
17 advised Plaintiffs to stop making monthly payments.” *Id.* at 3. The First Amended Complaint  
18 alleges that the “foreclosing Notice of Trustee Sale, was recorded by unauthorized party  
19 Defendant Quality Loan Service,” and “Defendant Jay Gafner, as auctioneer and an  
20 unidentified ‘highest bidder’ acted wrongfully as agents for Defendants in proceeding with the  
21 public auction sale after being put on constructive notice of a fraudulent sale transaction by  
22 Plaintiff Sean Park.” *Id.*

23 The First Amended Complaint alleges seventeen causes of action against all  
24 Defendants: (1) violation of the Truth in Lending Act (“TILA”); (2) violation of California’s  
25 Rosenthal Fair Debt Collection Practices Act (“RFDCPA”); (3) violation of the Fair Debt  
26 Collection Practices Act (“FDCPA”); (4) wrongful foreclosure; (5) violation of the Real Estate  
27 Settlement Procedures Act (“RESPA”); (6) breach of fiduciary duty; (7) fraud – intentional  
28 misrepresentation; (8) fraud – negligent misrepresentation; (9) violations of California

1 Business and Professions Code § 17200; (10) breach of contract – promissory estoppel; (11)  
 2 breach of the implied covenant of good faith and fair dealing; (12) conversion; (13) violation  
 3 of California Civil Code § 2923.5; (14) quiet title; (15) injunctive relief; (16) rescission; and  
 4 (17) accounting. The First Amended Complaint alleges federal question subject matter  
 5 jurisdiction pursuant to 28 U.S.C. § 1331. Plaintiffs seek damages, injunctive relief and  
 6 declaratory relief.

7 On May 24, 2011, Defendants Sundance LLC and Daniel Grois filed an Answer to the  
 8 First Amended Complaint. (ECF No. 96).

9 On May 26, 2011 and May 27, 2011, the moving Defendants filed the Motions to  
 10 Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), and a Request for Judicial  
 11 Notice. (ECF Nos. 97, 100).

12 On June 22, 2011, Plaintiffs filed oppositions to the Motions to Dismiss. (ECF Nos.  
 13 102, 103, 104). Plaintiffs contend that the Motions to Dismiss should be denied, or  
 14 alternatively, that Plaintiffs should be granted leave to amend the First Amended Complaint.

15 On June 28, 2011, the moving Defendants filed reply briefs. (ECF Nos. 105, 106).

## 16 **II. Discussion**

### 17 **A. Standard of Review**

18 Federal Rule of Civil Procedure 12(b)(6) permits dismissal for “failure to state a claim  
 19 upon which relief can be granted.” Fed. R. Civ. P. 12(b)(6). Dismissal under Rule 12(b)(6)  
 20 is appropriate where the complaint lacks a cognizable legal theory or sufficient facts to support  
 21 a cognizable legal theory. *See Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir.  
 22 1990). To sufficiently state a claim to relief and survive a Rule 12(b)(6) motion, a complaint  
 23 “does not need detailed factual allegations” but the “[f]actual allegations must be enough to  
 24 raise a right to relief above the speculative level.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544,  
 25 555 (2007). “[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’  
 26 requires more than labels and conclusions, and a formulaic recitation of the elements of a cause  
 27 of action will not do.” *Id.* (quoting Fed. R. Civ. P. 8(a)(2)). When considering a motion to  
 28 dismiss, a court must accept as true all “well-pleaded factual allegations.” *Ashcroft v. Iqbal*,

1 --- U.S. ----, 129 S. Ct. 1937, 1950 (2009). However, a court is not “required to accept as true  
 2 allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable  
 3 inferences.” *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). “In sum,  
 4 for a complaint to survive a motion to dismiss, the non-conclusory factual content, and  
 5 reasonable inferences from that content, must be plausibly suggestive of a claim entitling the  
 6 plaintiff to relief.” *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (quotations  
 7 omitted). “Courts have a duty to construe pro se pleadings liberally.” *Bernhardt v. Los*  
 8 *Angeles County*, 339 F.3d 920, 925 (9th Cir. 2003) (citation omitted).

### 9 **B. Request for Judicial Notice**

10 “A district court ruling on a motion to dismiss may consider documents whose contents  
 11 are alleged in a complaint and whose authenticity no party questions, but which are not  
 12 physically attached to the plaintiff’s pleading.” *Parrino v. FHP, Inc.*, 146 F.3d 699, 705-06  
 13 (9th Cir. 1998) (quotation omitted). Also, “a district court ruling on a motion to dismiss may  
 14 consider a document the authenticity of which is not contested, and upon which the plaintiff’s  
 15 complaint necessarily relies.” *Id.* at 706.

16 The moving Defendants request that the Court take judicial notice of the documents  
 17 executed by Plaintiff and relating to the property at issue, including the Deed of Trust, the  
 18 Notice of Default, the Notice of Trustee’s Sale, the Corporate Assignment of Deed of Trust,  
 19 and the Trustee’s Deed Upon Sale. (ECF No. 100-1). Plaintiffs do not oppose the Request for  
 20 Judicial Notice.

21 The First Amended Complaint either references or necessarily relies upon each of the  
 22 documents which are attached to the Request for Judicial Notice. The authenticity of the  
 23 documents has not been challenged. Accordingly, the Request for Judicial Notice is granted.

### 24 **C. Motions to Dismiss**

25 Plaintiffs allege each of the seventeen causes of action against each of the Defendants.  
 26 Each of the moving Defendants move for the dismissal of each cause of action.

#### 27 **1. TILA**

28 Plaintiffs allege that Defendants violated TILA, 15 U.S.C. §§ 1601, *et seq.*, and seek

1 damages, and “rescission of the Subject Loan [and] an order requiring Defendants ... to  
2 terminate any security interest in the Subject Property.” (ECF No. 90 at 19).

3 The moving Defendants move for the dismissal of the TILA claim for damages on the  
4 basis that the statute of limitations has expired. The moving Defendants move for the  
5 dismissal of the TILA claim for rescission on the basis that Plaintiffs have failed to adequately  
6 allege tender.<sup>1</sup>

7 **a. TILA Claim for Damages**

8 Damages claims under TILA must be brought “within one year from the date of the  
9 occurrence of the violation.” 15 U.S.C. § 1640(e). “[A]s a general rule the limitations period  
10 starts at the consummation of the transaction.” *King v. California*, 784 F.2d 910, 915 (9th Cir.  
11 1986). “[E]quitable tolling may be applied if, despite all due diligence, a plaintiff is unable  
12 to obtain vital information bearing on the existence of his claim.” *Santa Maria v. Pacific Bell*,  
13 202 F.3d 1170, 1178 (9th Cir. 2000) (citation omitted). Generally, a litigant seeking equitable  
14 tolling of a limitations period bears the burden of establishing entitlement to equitable tolling.  
15 *Pace v. DiGuglielmo*, 544 U.S. 408, 418 (2005). Where a plaintiff alleges TILA violations  
16 during initial disclosures, equitable tolling is not appropriate if “nothing prevented [plaintiff]  
17 from comparing the loan contract, [the] initial disclosures, and TILA’s statutory and regulatory  
18 requirements.” *Hubbard v. Fidelity Fed. Bank*, 91 F.3d 75, 70 (9th Cir. 1996) (citing *King*,  
19 784 F.2d at 915).

20 The First Amended Complaint alleges that Plaintiffs obtained the loan on August 15,  
21 2007. Plaintiffs filed this lawsuit on July 26, 2010, nearly three years after the loan transaction  
22 was consummated. Accordingly, Plaintiffs’ TILA claim for damages is barred by the one-year  
23 statute of limitations, unless equitable tolling applies. In their opposition brief, Plaintiffs state  
24 that “[t]he statute of limitations to recover Plaintiffs’ damages under TILA may be equitably  
25 tolled.” (ECF No. 103 at 17). However, the First Amended Complaint does not adequately  
26 allege facts indicating that, “despite all due diligence, [Plaintiffs were] unable to obtain vital

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27  
28 <sup>1</sup> The moving Defendants move for the dismissal of all claims in the First Amended  
Complaint seeking an equitable remedy on the basis of Plaintiffs’ failure to adequately allege  
tender. The Court will address each claim as it is alleged in the First Amended Complaint.

1 information bearing on the existence of [their] claim.” *Santa Maria*, 202 F.3d at 1178.  
 2 Because Plaintiffs fail to adequately allege the availability of equitable tolling, Plaintiffs’ claim  
 3 for damages pursuant to TILA is barred by the statute of limitations.

4 **b. TILA Claim for Rescission**

5 In order to ultimately prevail on a TILA rescission claim, the borrower will be obligated  
 6 to tender the property the borrower received from the creditor under the loan. *See* 15 U.S.C.  
 7 § 1635(b); 12 C.F.R. § 226.23(d); *cf. Yamamoto v. Bank of N.Y.*, 329 F.3d 1167, 1173 (9th Cir.  
 8 2003) (holding that “courts [are] free to exercise equitable discretion to modify rescission  
 9 procedures.”). “By far, the majority of Courts to address the issue recently have required that  
 10 borrowers allege an ability to tender the principal balance of the subject loan in order to state  
 11 a claim for rescission under TILA.” *Garcia v. Wachovia Mortg. Corp.*, 676 F. Supp. 2d 895,  
 12 901 (2009) (collecting cases). This rule is in recognition of the principle that “[e]quity will not  
 13 interpose its remedial power in the accomplishment of what seemingly would be nothing but  
 14 an idly and expensively futile act, nor will it purposely speculate in a field where there has  
 15 been no proof as to what beneficial purpose may be subserved through its intervention.”  
 16 *Karlsen v. Am. Sav. & Loan Ass’n*, 15 Cal. App. 3d 112, 118 (1971) (quotation omitted); *see*  
 17 *also Garza v. Am. Home Mortg.*, No. CV 08-1477, 2009 WL 188604, at \*5 (E.D. Cal. Jan. 27,  
 18 2009) (“The complaint fails to hint that [plaintiff] is able to fulfill her [tender] obligations  
 19 under 15 U.S.C. § 1635(b) and 12 C.F.R. § 226.23(d). Rescission is an empty remedy without  
 20 [plaintiff’s] ability to pay back what she has received.”).

21 Plaintiffs allege that the loan amount was \$840,000. Plaintiffs allege: “As soon as  
 22 Defendants meet their required obligations, ... Plaintiffs are ready and able to tender whatever  
 23 remaining mortgage debt has been judicially determined. If for any reason Plaintiffs cannot  
 24 tender the full amount due, Plaintiffs have several qualified buyers ready to submit letters of  
 25 intent to this ... Court.” (ECF No. 90 at 19).

26 Plaintiffs do not allege any specific facts related to the “qualified buyers.” Plaintiffs  
 27 do not otherwise allege specific facts as to how Plaintiffs would be able to able to tender the  
 28 loan proceeds. Even construing the First Amended Complaint liberally, the Court finds that

1 Plaintiffs' allegations are insufficient to plausibly show an ability to tender. *See Iqbal*, 129 S.  
2 Ct. at 1950.

3 The Motions to Dismiss are granted as to the first cause of action for violation of TILA.

## 4 **2. Fair Debt Collection Practices Acts**

5 The second and third causes of action allege violations of the FDCPA, 15 U.S.C. §§  
6 1692, *et seq.*, and the RFDCPA, Cal. Civ.Code § 1788, *et seq.*

7 The moving Defendants move for the dismissal of the FDCPA and RFDCPA claims on  
8 the basis that "foreclosing on a Deed of Trust does not invoke the statutory protections" of the  
9 FDCPA and RFDCPA. (ECF No. 100 at 16).

10 The FDCPA and RFDCPA prohibit debt collectors from engaging in abusive, deceptive  
11 and unfair practices in the collection of consumer debts. *See* 15 U.S.C. § 1692; Cal. Civ. Code  
12 § 1788.1. A defendant must be a "debt collector" to be liable pursuant to the FDCPA and the  
13 RFDCPA. *Heintz v. Jenkins*, 514 U.S. 291, 294 (1995); *see also* Cal. Civ. Code § 1788.2(c).  
14 "The legislative history of section 1692a(6) indicates conclusively that debt collector does not  
15 include ... a mortgage servicing company, or an assignee of a debt, as long as the debt was not  
16 in default at the time it was assigned." *Perry v. Stewart Title Co.*, 756 F.2d 1197, 1208 (5th  
17 Cir. 1985).

18 The FDCPA and RFDCPA do not apply to foreclosure activities. *See Walker v. Equity*  
19 *1 Lenders Group*, Case No. 09cv325 WQH (AJB), 2009 WL 1364430 at \*7 (S.D. Cal. May  
20 14, 2009) ("The activity of foreclosing on [a] property pursuant to a deed of trust is not the  
21 collection of a debt within the meaning of the FDCPA or the RFDCPA.") (quotation omitted);  
22 *Champlaie v. BAC Home Loans Servicing, LP*, 706 F. Supp. 2d 1029, 1054-55 (E.D. Cal.  
23 2009) ("Foreclosure on a property as security on a debt is not debt collection activity  
24 encompassed by the Rosenthal Act."); *Hulse v. Ocwen Fed. Bank, FSB*, 195 F. Supp. 2d 1188,  
25 1204 (D. Or. 2002) ("Foreclosing on a trust deed is distinct from the collection of the  
26 obligation to pay money. The FDCPA is intended to curtail objectionable acts occurring in the  
27 process of collecting funds from a debtor.... Payment of funds is not the object of the  
28 foreclosure action. Rather, the lender is foreclosing its interest in the property."); *but see*



1 *Austero v. Aurora Loan Servs., Inc.*, Case No. C-11-490, 2011 WL 1585530, at \*9 (N.D. Cal.  
 2 Apr. 27, 2011) (holding that “[w]here the claim arises out of debt collection activities beyond  
 3 the scope of the ordinary foreclosure process, however, a remedy may be available under the  
 4 Rosenthal Act”) (quotation omitted).

5 The First Amended Complaint alleges:

6 Defendants’ actions constitute a violation of the [RFDCPA], in that they took  
 7 and threatened to take actions prohibited by law, including, without limitation:  
 8 an illegal auction falsely stating the amount of the debt; increasing the amount  
 9 of the debt by including amounts not permitted by law or contract; improperly  
 10 foreclosing on the Subject Property; and using unfair and unconscionable means  
 11 in an attempt to collect a debt.

12 (ECF No. 90 at 21-22; *see also id.* at 24 (same, with respect to FDCPA)).

13 To the extent the First Amended Complaint alleges violations of the FDCPA and  
 14 RFDCPA related to the ordinary foreclosure process, the acts do not apply because the  
 15 allegations are not related to collection activities. To the extent Plaintiffs allege Defendants  
 16 acted outside of the scope of the ordinary foreclosure process, the First Amended Complaint  
 17 fails to adequately allege how each Defendant constitutes a debt collector pursuant to the acts,  
 18 and how each Defendant violated the acts. *See Iqbal*, 129 S. Ct. at 1950.

19 The Motions to Dismiss are granted as to the second and third causes of action for  
 20 violations of the FDCPA and RFDCPA.

### 21 **3. Wrongful Foreclosure**

22 Wrongful foreclosure is an action in equity, where a plaintiff seeks to set aside a  
 23 foreclosure sale. *See Abdallah v. United Sav. Bank*, 43 Cal. App. 4th 1101, 1009 (1996);  
 24 *Karlsen*, 15 Cal. App. 3d at 117. Under California law, “[w]hen a debtor is in default of a  
 25 home mortgage loan, and a foreclosure is either pending or has taken place, the debtor must  
 26 allege a credible tender of the amount of the secured debt to maintain any cause of action for  
 27 wrongful foreclosure.” *Alicea v. GE Money Bank*, No. C-09-91, 2009 WL 2136969, at \*3  
 28 (N.D. Cal. July 16, 2009). “A valid and viable tender of payment of the indebtedness owing  
 is essential to an action to cancel a voidable sale under a deed of trust.” *Karlsen*, 15 Cal. App.  
 3d at 117-18; *see also FPCI RE-HAB 01 v. E&G Invs., Ltd.*, 207 Cal. App. 3d 1018, 1021  
 (1989) (same). “A valid and viable offer of tender means that it is made in good faith, the



1 party making the tender has the ability to perform, and the tender must be unconditional.”  
2 *Alicea*, 2009 WL 2136969, at \*3 (citation omitted).

3 As discussed above, the allegations in the First Amended Complaint are insufficient to  
4 plausibly show an ability and willingness to tender. *See Iqbal*, 129 S. Ct. at 1950.

5 The Motions to Dismiss are granted as to the fourth cause of action for wrongful  
6 foreclosure.

#### 7 **4. RESPA**

8 The fifth cause of action of the First Amended Complaint alleges that “Defendants  
9 violated RESPA at the time of closing of the Loan Agreement by failing to properly and  
10 accurately comply with disclosure requirements in that ... Defendants did not provide a  
11 Servicing Statement as set forth in 12 U.S.C. § 2605(a); ... and did not properly respond to a  
12 Qualified Written Request as set forth in 12 U.S.C. § 2605(e)...” (ECF No. 90 at 28).

13 The moving Defendants move to dismiss the claim for violation of RESPA on the basis  
14 that any claims originating at the time of the loan transaction are barred by the statute of  
15 limitations, and otherwise “Plaintiffs have ... failed to allege any actual damages they have  
16 sustained, or improper fees they have incurred, as a result of any RESPA violations.” (ECF  
17 No. 100 at 20).

##### 18 **a. Statute of Limitations**

19 Violations of RESPA section 2605 are subject to a one-year statute of limitations. *See*  
20 12 U.S.C. § 2614. The RESPA statute of limitations runs “from the date of the occurrence of  
21 the violation.” *Id.* Apart from Plaintiffs’ allegations related to the failure to respond to a  
22 Qualified Written Request (addressed below), Plaintiffs’ RESPA claim appears to be based on  
23 allegations of failure to disclose information “at the time of closing of the Loan Agreement”  
24 on August 15, 2007. (ECF No. 90 at 28). Plaintiffs filed this lawsuit on July 26, 2010, nearly  
25 three years after the closing of the loan transaction. As discussed above, Plaintiffs fail to  
26 allege facts which would support equitable tolling of the statute of limitations. Accordingly,  
27 Plaintiffs’ claim for violations of RESPA related to nondisclosure at the time of the loan  
28 transaction is barred by the statute of limitations.

**b. Qualified Written Request**

Section 2605 of RESPA requires that “[i]f any servicer of a federally related mortgage loan receives a qualified written request from the borrower (or an agent of the borrower) for information relating to the servicing of such loan, the servicer shall provide a written response acknowledging receipt of the correspondence within 20 days ... unless the action requested is taken within such period.” 12 U.S.C. § 2605(e)(1)(A); *see also* 12 U.S.C. § 2605(e)(2) (describing the action required to be taken in response to a qualified written request). If a loan servicer fails to comply with the provisions of § 2605, a borrower shall be entitled to “any actual damages to the borrower as a result of the failure” and “any additional damages, as the court may allow, in the case of a pattern or practice of noncompliance with the requirements of [§ 2605].” 12 U.S.C. § 2605(f)(1).

Plaintiffs allege that they sent a Qualified Written Request to Defendant Select Portfolio Servicing on May 13, 2010, and Defendants “did not properly respond.” (ECF No. 90 at 28; *see also id.* at 92). The moving Defendants move to dismiss on the basis that Plaintiffs failed to adequately allege damages.

**i. Actual Damages**

“Numerous courts have read Section 2605 as requiring a showing of pecuniary damages to state a claim.” *Molina v. Wash. Mut. Bank*, No. 09cv894, 2010 WL 431439, at \*7 (S.D. Cal. Jan. 29, 2010) (collecting cases). “This pleading requirement has the effect of limiting the cause of action to circumstances in which plaintiff can show that a failure to respond or give notice has caused them actual harm.” *Shepherd v. Am. Home Mortg. Servs., Inc.*, No. 09-1916, 2009 WL 4505925, at \*3 (E.D. Cal. Nov. 20, 2009) (citation omitted); *cf. Yulaeva v. Greenpoint Mortg. Funding, Inc.*, No. 09-1504, 2009 WL 2880393, at \*15 (E.D. Cal. Sept. 9, 2009) (plaintiff sufficiently pled actual damages where plaintiff alleged she was required to pay a specific referral fee prohibited under RESPA).

The First Amended Complaint alleges:

Defendants’ failure to comply with RESPA has directly and proximately caused Plaintiffs to suffer actual damages including, without limitation: monetary loss, loss of appetite, frustration, fear, anger, helplessness, nervousness, anxiety, sleeplessness, sadness and depression and other significant emotional suffering

1 and distress, loss of ability to refinance other property due to loss of previously  
 2 outstanding credit, loss of business opportunities due to damage in contractual  
 3 relationships with Plaintiffs' tenants, out of pocket costs of legal research, audit  
 4 and other professional fees, court costs, and future damages....

(ECF No. 90 at 29).

5 Even construing the First Amended Complaint liberally, Plaintiffs fail to plead non-  
 6 conclusory factual allegations indicating how they were damaged by the alleged failure to  
 7 properly respond to the Qualified Written Request. *Cf. Allen v. United Fin. Mortg. Corp.*, 660  
 8 F. Supp. 2d 1089, 1097 (N.D. Cal. 2009) ("Allen only offers the conclusory statement that  
 9 'damages consist of the loss of plaintiff's home together with his attorney fees.' He has not  
 10 actually attempted to show that the alleged RESPA violations caused any kind of pecuniary  
 11 loss (indeed, his loss of property appears to have been caused by his default)."). Plaintiffs fail  
 12 to allege how the failure of the Defendants to comply with RESPA, as opposed to Plaintiffs'  
 13 default or the other alleged actions of Defendants, plausibly caused the damages alleged in the  
 14 First Amended Complaint. *Cf. Lawther v. OneWest Bank*, No. C-10-54, 2010 WL 4936797,  
 15 at \*7 (N.D. Cal. Nov. 30, 2010) (granting motion to dismiss RESPA claim for failure to  
 16 adequately allege actual damages because "[w]hat remains unexplained ... is how the QWR  
 17 failure itself is causally connected to the claimed distress of Lawther or his family"); *Lal v. Am.*  
 18 *Home Servicing, Inc.*, 680 F. Supp. 2d 1218, 1223 (E.D. Cal. 2010) ("[S]imply having to file  
 19 suit [does not] suffice as a harm warranting actual damages. If such were the case, every  
 20 RESPA suit would inherently have a claim for damages built in."). Plaintiffs fail to allege how  
 21 the failure to respond to the Qualified Written Request caused the reduction in their credit  
 22 rating and the "loss of ability to refinance other property." ECF No. 90 at 28. The Court finds  
 23 that Plaintiffs' RESPA claim for actual damages for failure to respond to the Qualified Written  
 24 Request is inadequately pled. *See Iqbal*, 129 S. Ct. at 1950.

## 25 **ii. Statutory Damages**

26 To recover statutory damages, a plaintiff must plead a pattern or practice of  
 27 noncompliance with RESPA. *See* 12 U.S.C. § 2605(f)(1)(b).

28 The First Amended Complaint alleges that Plaintiffs are entitled to statutory and  
 punitive damages because Select Portfolio Servicing has "engaged in a pattern or practice of

1 non-compliance” with RESPA. (ECF No. 90 at 29). “For the purpose of establishing and  
 2 supporting” this allegation, Plaintiffs attach to the First Amended Complaint a press release  
 3 from the Federal Trade Commission dated November 12, 2003. *Id.* The press release concerns  
 4 settlements reached by the Federal Trade Commission and the U.S. Department of Housing  
 5 and Urban Development with Fairbanks Holding Corporation, Fairbanks Capital Corporation,  
 6 and their former CEO, Thomas D. Basmajian, for alleged violations of RESPA and other  
 7 statutes. *See id.* at 121-24. Plaintiffs appear to contend that Select Portfolio Servicing has a  
 8 relationship to the parties discussed in the press release, but Plaintiffs fail to adequately allege  
 9 the nature of the relationship, and why the alleged RESPA violations of Fairbanks Holding  
 10 Corporation and Fairbanks Capital Corporation should be imputed to Select Portfolio  
 11 Servicing. The Court finds that the allegations of a pattern or practice of noncompliance with  
 12 RESPA are conclusory, and do not plausibly show a pattern and practice of RESPA violations  
 13 by Select Portfolio Servicing or the other Defendants in this action. *See Iqbal*, 129 S. Ct. at  
 14 1950; *cf. Lal*, 680 F. Supp. 2d at 1223 (RESPA claim deficient because “Plaintiffs flatly claim  
 15 a pattern of noncompliance but state no facts other than the assurance that at trial they will  
 16 present other customers who also did not receive QWR responses from Defendant.”); *Garvey*  
 17 *v. Am. Home Mortg. Servicing, Inc.*, No. CV-09-973, 2009 WL 2782128, at \*2 (D. Ariz. Aug.  
 18 31, 2009) (same). The Court finds that Plaintiffs’ RESPA claim for statutory damages is  
 19 inadequately pled.

20 The Motions to Dismiss are granted as to the fifth cause of action for violation of  
 21 RESPA.<sup>2</sup>

## 22 5. Breach of Fiduciary Duty

23 The moving Defendants move for the dismissal of the sixth cause of action for breach  
 24 of fiduciary duty on the basis that the moving Defendants did not have a fiduciary relationship  
 25 with Plaintiffs.

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27 <sup>2</sup> The Court has dismissed all federal law claims as to the moving Defendants. At this  
 28 stage in the proceedings, the Court will exercise supplemental jurisdiction over the state law  
 claims pursuant to 28 U.S.C. § 1367 because this case will proceed on the federal law claims  
 against other Defendants, *see* ECF No. 96.

1 “The elements of a cause of action for breach of fiduciary duty are: (1) existence of a  
2 fiduciary duty; (2) breach of the fiduciary duty; and (3) damage proximately caused by the  
3 breach.” *Stanley v. Richmond*, 35 Cal. App. 4th 1070, 1086 (1995). Under California law:

4 Absent special circumstances a loan transaction is at arm’s length and there is  
5 no fiduciary relationship between the borrower and lender. A commercial lender  
6 pursues its own economic interests in lending money. A lender owes no duty  
7 of care to the borrowers in approving their loan. A lender is under no duty to  
determine the borrower’s ability to repay the loan. The lender’s efforts to  
determine the creditworthiness and ability to repay by a borrower are for the  
lender’s protection, not the borrower’s.

8 *Perlas v. GMAC Mortg., LLC*, 187 Cal. App. 4th 429, 436 (2010) (quotations and citations  
9 omitted); *see also Nymark v. Heart Fed. Sav. & Loan Ass’n*, 231 Cal. App. 3d 1089, 1095-96  
10 (1991) (“As a general rule, a financial institution owes no duty of care to a borrower when the  
11 institution’s involvement in the loan transaction does not exceed the scope of its conventional  
12 role as a mere lender of money.”). A lender does not have a duty to procure a loan  
13 modification for a borrower. *See Dooms v. Fed. Home Loan Mortg. Corp.*, Case No. 11-cv-  
14 352, 2011 WL 1303272 at \*9 (E.D. Cal. Mar. 31, 2011); *Curtis v. Option One Mortg. Corp.*,  
15 Case No. 09-cv-1608, 2010 WL 599816 at \*12 (E.D. Cal. Feb. 18, 2010).

16 The First Amended Complaint alleges generally that, “all Defendants owed a duty of  
17 loyalty and a duty to deal fairly with Plaintiffs at all times.” (ECF No. 90 at 31). The First  
18 Amended Complaint fails to adequately allege any “special circumstances” that establish a  
19 fiduciary relationship between Plaintiffs and each Defendant. *Perlas*, 187 Cal. App. 4th at  
20 436. The Court finds that Plaintiffs’ claim for breach of fiduciary duty is inadequately pled.

21 The Motions to Dismiss are granted as to the sixth cause of action for breach of  
22 fiduciary duty.

## 23 **6. Fraud**

24 The moving Defendants move for the dismissal of the seventh and eighth causes of  
25 action for “fraud – intentional misrepresentation” and “fraud – negligent misrepresentation,”  
26  
27  
28

1 ECF No. 90 at 32, 34, on the basis that the claims are inadequately pled.<sup>3</sup>

2 “To establish a claim for fraudulent misrepresentation, the plaintiff must prove: (1) the  
3 defendant represented to the plaintiff that an important fact was true; (2) that representation  
4 was false; (3) the defendant knew that the representation was false when the defendant made  
5 it, or the defendant made the representation recklessly and without regard for its truth; (4) the  
6 defendant intended that the plaintiff rely on the representation; (5) the plaintiff reasonably  
7 relied on the representation; (6) the plaintiff was harmed; and, (7) the plaintiff’s reliance on  
8 the defendant’s representation was a substantial factor in causing that harm to the plaintiff.”

9 *Perlas*, 187 Cal. App. 4th at 434 (citation omitted). The elements of a negligent  
10 misrepresentation claim are: “(1) a misrepresentation of a past or existing material fact, (2)  
11 without reasonable ground for believing it to be true, (3) with the intent to induce another’s  
12 reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5)  
13 resulting damages.” *Nat’l Union Fire Ins. Co. v. Cambridge Integrated Servs. Group, Inc.*,  
14 171 Cal. App. 4th 35, 50 (2009). “It is well-established in the Ninth Circuit that both claims  
15 for fraud and negligent misrepresentation must meet Rule 9(b)’s particularity requirement.”  
16 *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1141 (C.D. Cal. 2003) (citation  
17 omitted). Pursuant to Rule 9(b), “in alleging fraud or mistake, a party must state with  
18 particularity the circumstances constituting fraud or mistake.” Fed. R. Civ. P. 9(b). Rule 9(b)  
19 does not allow a complaint to merely lump multiple defendants together but “require[s]  
20 plaintiffs to differentiate their allegations when suing more than one defendant ... and inform  
21 each defendant separately of the allegations surrounding his alleged participation in the fraud.”  
22 *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007). “[T]he plaintiffs must, at a  
23 minimum, identify the role of each defendant in the alleged fraudulent scheme.” *Id.*; see also  
24 *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 541 (9th Cir. 1989) (“While

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25  
26 <sup>3</sup> The moving Defendants also contend that the Court should “disregard” the fraud  
27 allegations in the First Amended Complaint as “merely a sham” because “Plaintiffs’ original  
28 Complaint alleged fraud in connection with the loan’s origination,” but “Plaintiffs now have  
changed their tune” and alleged fraud after loan origination. (ECF No. 100 at 22). In support  
of this contention, Defendants rely upon *Lee v. Hensley*, 103 Cal. App. 2d 697, 708-09 (1951).  
The Court does not find that application of this California pleading rule is appropriate in this  
case.



1 statements of the time, place and nature of the alleged fraudulent activities are sufficient, mere  
2 conclusory allegations of fraud are insufficient.”).

3 The First Amended Complaint alleges:

4 At 10am on June 30, 2009, Plaintiffs called 888-818-6032 and spoke with  
5 [Select Portfolio Servicing] agent Brandon Overstreet who instructed Plaintiffs  
6 that they must stop making monthly payments and allow the subject property to  
7 go into default in order to qualify for a lower monthly payment.

8 Plaintiffs ... justifiably relied on SPS agent Brandon Overstreet[’s]  
9 representations which were material to Plaintiffs’ decision to refrain from selling  
10 or arranging refinancing of the subject property, and to cease making payments  
11 in connection with the Subject Loan, and Defendants knew these representations  
12 were false.

13 Defendants and their agent Brandon Overstreet made the representations to  
14 Plaintiffs with knowledge of the falsity and with reckless disregard for their  
15 truth or falsity.

16 Defendants and their agent Brandon Overstreet made the representations to  
17 Plaintiffs with the knowledge and intent that Plaintiffs would rely on the  
18 representations and with the intent to deceive Plaintiffs ... and to wrongfully  
19 induce Plaintiffs into relying on a future permanently modified loan contract.

20 In reasonable and justifiable reliance on Defendants’ and their agents’  
21 representations, ... Plaintiffs were induced to their detriment to believe the  
22 subject property was secure and any prospective foreclosure had been  
23 indefinitely postponed and the subject property was not subject to sale by non-  
24 judicial foreclosure.

25 But for Defendants’ representations, Plaintiffs would have sold or refinanced the  
26 subject property to recover their equity before the sale....

27 Defendants’ above mentioned fraudulent misrepresentation ... has directly and  
28 proximately caused Plaintiffs to suffer actual damages....

(ECF No. 90 at 32-33; *see also id.* at 34-35 (same, with respect to cause of action for negligent  
misrepresentation)).

Viewing these allegations liberally, the Court finds that the First Amended Complaint  
adequately alleges causes of action for intentional and negligent misrepresentation against  
Defendant Select Portfolio Servicing. The First Amended Complaint specifically identifies  
the identity of the Select Portfolio Servicing agent who made the alleged misrepresentation and  
the date and time when the alleged misrepresentation was made. The First Amended  
Complaint adequately alleges the contents of the alleged misrepresentation, and adequately  
alleges the remaining elements of the intentional and negligent misrepresentation causes of



1 action as to Select Portfolio Servicing.

2 The Court finds that the First Amended Complaint fails to adequately allege causes of  
3 action for intentional and negligent misrepresentation as to the remainder of the moving  
4 Defendants. The First Amended Complaint fails to “inform each [remaining] defendant  
5 separately of the allegations surrounding his alleged participation in the fraud,” and fails to  
6 “identify the role of each [remaining] defendant in the alleged fraudulent scheme.” *Swartz*,  
7 476 F.3d at 764-65.

8 The Motion to Dismiss is denied as to the claims for intentional and negligent  
9 misrepresentation against Select Portfolio Servicing. The Motions to Dismiss are granted as  
10 to the claims for intentional and negligent misrepresentation against all other moving  
11 Defendants.

## 12 7. Breach of Contract – Promissory Estoppel

13 In the tenth cause of action for “breach of contract – promissory estoppel,” the First  
14 Amended Complaint alleges:

15 Plaintiffs fully and faithfully performed all of the covenants, terms, conditions,  
16 and obligations required under the permanently modified mortgage loan  
17 agreement for the Subject property on their part to be performed, as alleged in  
18 the previous paragraphs of Plaintiffs’ complaint. Defendants unexpectedly  
19 rejected their earlier agreement to permanently modify the subject loan contract  
20 and proceeded with a wrongful and unwarranted foreclosure sale.

21 The doctrine of promissory estoppel makes Defendants’ ... promise to modify  
22 the subject loan agreement if Plaintiffs voluntarily entered a default on the  
23 subject loan agreement binding under the circumstances.

24 (ECF No. 90 at 37).

25 The moving Defendants move to dismiss this cause of action on the following two  
26 grounds: “[B]ecause Plaintiffs have not alleged the purported modification agreement was  
27 reduced to a writing, it fails to satisfy the Statute of Frauds and, as a result, is not binding on  
28 either party. Plaintiffs also do not provide any facts to suggest that they performed their  
obligations under the purported modification agreement (or that they were excused from doing  
so).” (ECF No. 100 at 24-25).

Mortgages and deeds of trust are subject to the statute of frauds. *See* Cal. Civ. Code §  
2922. “An agreement to modify a contract that is subject to the statute of frauds is also subject

1 to the statute of frauds.” *Seacrest v. Security Nat’l Mortg. Loan Trust* 2002-2, 167 Cal. App.  
2 4th 544, 553 (2008) (citing Cal. Civ. Code § 1698). To the extent Plaintiffs’ tenth cause of  
3 action alleges a claim for breach of contract, the claim as pled is barred by the statute of frauds.  
4 *See id.* at 547 (holding that a mortgage loan forbearance agreement was barred by the statute  
5 of frauds). The Motions to Dismiss are granted as to the tenth cause of action, to the extent  
6 it alleges a claim for breach of contract.

7 In the tenth cause of action, Plaintiffs also purport to state a claim for promissory  
8 estoppel. To the extent Plaintiffs allege a promissory estoppel claim, the Court finds that it is  
9 inappropriate to dismiss the claim at this stage on the basis of the statute of frauds. *See Garcia*  
10 *v. World Sav., FSB*, 183 Cal. App. 4th 1031, 1041 n.10 (2010) (denying motion for summary  
11 judgment on borrower’s promissory estoppel claim related to an alleged promise to delay  
12 foreclosure and holding that “to the extent [plaintiffs]’ claim is premised on promissory  
13 estoppel, neither section 1698 nor the statute of frauds will defeat their claim”).

14 Defendants also move to dismiss on the basis that “Plaintiffs ... do not provide any facts  
15 to suggest that they performed their obligations under the purported modification agreement  
16 (or that they were excused from doing so).” (ECF No. 100 at 24-25). To the extent Plaintiffs  
17 allege a promissory estoppel claim, it is not necessary for Plaintiffs to allege that Plaintiffs  
18 performed—or even had—any obligations to Defendants. *See Garcia*, 183 Cal. App. 4th at  
19 1040-41 (“The absence of consideration or benefit to the promisor does not, however, defeat  
20 a claim based on promissory estoppel. The doctrine of promissory estoppel makes a promise  
21 binding under certain circumstances, without consideration in the usual sense of something  
22 bargained for and given in exchange.”) (quotation omitted). The Court finds that it is  
23 inappropriate to dismiss the promissory estoppel claim because “Plaintiffs ... do not provide  
24 any facts to suggest that they performed their obligations under the purported modification  
25 agreement (or that they were excused from doing so).” (ECF No. 100 at 24-25).

26 The only specific promises alleged to have been made in the First Amended Complaint  
27 are alleged to have been made by representatives of Defendant Select Portfolio Servicing. *See*  
28 ECF No. 90 at 10-11 (alleging promises made related to loan modification by Select Portfolio

1 Servicing agents Brandon Overstreet and Miguel Gonzales). Because Plaintiffs fail to  
 2 adequately allege that any other Defendant made promises to Plaintiffs, the Motions to Dismiss  
 3 are granted as to the promissory estoppel claim against all moving Defendants other than  
 4 Select Portfolio Servicing.

5 In its Motion to Dismiss, Select Portfolio Servicing does not address the promissory  
 6 estoppel claim in the tenth cause of action, and does not contend that any specific element of  
 7 the promissory estoppel claim is inadequately pled. *See* ECF No. 100 at 24-25. Accordingly,  
 8 the Court does not decide whether the promissory estoppel claim is adequately pled. The  
 9 Court finds that the two grounds on which Select Portfolio Servicing challenged the tenth  
 10 cause of action does not merit dismissal of the promissory estoppel claim. Accordingly, the  
 11 Motion to Dismiss is denied as to the promissory estoppel claim against Select Portfolio  
 12 Servicing.

### 13 **8. Breach of the Implied Covenant of Good Faith and Fair Dealing**

14 The moving Defendants move to dismiss the eleventh cause of action for breach of the  
 15 covenant of good faith and fair dealing on the basis that “Plaintiffs must show a special  
 16 relationship between themselves and the lender,” and “as a matter of law, there is no fiduciary  
 17 relationship between a lender and borrower.” (ECF No. 100 at 25-26).

18 “Generally, no cause of action for the tortious breach of the implied covenant of good  
 19 faith and fair dealing can arise unless the parties are in a special relationship with fiduciary  
 20 characteristics.” *Pension Trust Fund v. Fed. Ins. Co.*, 307 F.3d 944, 955 (9th Cir. 2002)  
 21 (applying California law). “[T]he implied covenant tort is not available to parties of an  
 22 ordinary commercial transaction where the parties deal at arms’ length.” *Id.* (citation omitted).  
 23 California courts do not invoke a special relationship between a lender and borrower. *See Kim*  
 24 *v. Sumitomo Bank*, 17 Cal. App. 4th 974, 979 (1993) (“the relationship of a bank-commercial  
 25 borrower does not constitute a special relationship for the purposes of the covenant of good  
 26 faith and fair dealing”); *Mitsui Mfrs. Bank v. Superior Court*, 212 Cal. App. 3d 726, 729  
 27 (1989) (borrower precluded to assert tortious breach of implied covenant of good faith and fair  
 28 dealing claim against lender). An exception to this general rule may exist if “the financial

1 dependence or personal security by the damaged party has been entrusted to the other” or  
2 “when [the lender] excessively controls or dominates the borrower.” *Pension Trust Fund*, 307  
3 F.3d at 955 (citations omitted).

4 The First Amended Complaint alleges that Plaintiffs were “full time landlords” who  
5 own “several income generating properties,” and leased to subject property to tenants. (ECF  
6 No. 90 at 16). Although Plaintiffs allege that they have been damaged by Defendants’ actions,  
7 the First Amended Complaint fails to adequately allege that Plaintiffs’ “financial dependence  
8 or personal security ... has been entrusted to” Defendants or that Defendants “excessively  
9 control[] or dominate[]” Plaintiffs. *Pension Trust Fund*, 307 F.3d at 955. The Court finds that  
10 the First Amended Complaint fails to adequately allege that Plaintiffs and any Defendant “are  
11 in a special relationship with fiduciary characteristics.” *Id.* Accordingly, the Motions to  
12 Dismiss are granted as to the eleventh cause of action for breach of the covenant of good faith  
13 and fair dealing.

#### 14 **9. Conversion**

15 The moving Defendants move to dismiss the twelfth cause of action for conversion  
16 because it “fails to state a valid cause of action”; “[c]onversion does not apply to real  
17 property”; and “Plaintiffs have no standing to allege conversion, where, as here, Plaintiffs do  
18 not allege that they have actual possession of the property (securities instruments) or the right  
19 to immediate possession at the time of the conversion.” (ECF No. 100 at 26-27).

20 The First Amended Complaint alleges that “the subject property promissory note” was  
21 purchased by investors “who illegally converted Plaintiffs’ note ... into unregistered securities,  
22 and illegally sold the rights and interest in those unregistered securities to investors all over  
23 the world as certificates, all without Plaintiffs’ informed consent as drawer ... of the note, in  
24 violation of 15 U.S.C. section 77 *et seq.*” (ECF No. 90 at 41).

25 In the twelfth cause of action, Plaintiffs appear to be alleging a claim related to the  
26 unlawful sale of unregistered securities in violation of federal law. In general, 15 U.S.C. § 77e  
27 makes it unlawful to sell unregistered securities. The elements of a § 77e claim are “(1) lack  
28 of a registration statement as to the subject securities; (2) the offer or sale of the securities; and

(3) the use of interstate transportation or communication and the mails in connection with the offer or sale.” *Europe & Overseas Commodity Traders, S.A. v. Banque Paribas London*, 147 F.3d 118, 124 n.4 (2d Cir. 1998). The Court finds that the First Amended Complaint fails to plausibly allege a cause of action for violation of § 77e as to any of the moving Defendants. *See Iqbal*, 129 S. Ct. at 1950.

The Motions to Dismiss are granted as to the twelfth cause of action for conversion.

#### **10. California Civil Code § 2923.5**

The thirteenth cause of action in the First Amended Complaint alleges that Defendants violated California Civil Code § 2923.5, which provides that “[a] mortgagee, trustee, beneficiary, or authorized agent may not file a notice of default ... until 30 days after” the “mortgagee, beneficiary, or authorized agent ... contact[s] the borrower in person or by telephone in order to assess the borrower’s financial situation and explore options for the borrower to avoid foreclosure.” Cal. Civ. Code § 2923.5(a)(1), (2). “There is nothing in section 2923.5 that requires the lender to rewrite or modify the loan.” *Mabry v. Superior Court*, 185 Cal. App. 4th 208, 214 (2010). “[T]he remedy for noncompliance is a simple postponement of the foreclosure sale, nothing more.” *Id.* If the foreclosure sale has already occurred, there is no remedy and failure to comply with the statute does not cause a cloud on the title. *See id.* at 235 (“There is nothing in section 2923.5 that even hints that noncompliance with the statute would cause any cloud on title after an otherwise properly conducted foreclosure sale.... [U]nder the plain language of section 2923.5, read in conjunction with section 2924g, the *only* remedy provided is a postponement of the sale before it happens.”) (emphasis in original).

Based upon the allegations of the First Amended Complaint, the foreclosure sale has occurred, and accordingly Civil Code § 2923.5 does not provide a remedy for Plaintiffs. The Motions to Dismiss are granted as to the thirteenth cause of action for violation of California Civil Code § 2923.5.

#### **11. Quiet Title**

The fourteenth cause of action in the First Amended Complaint is a claim to quiet title.

1 “[A] mortgagor of real property cannot, without paying his debt, quiet his title against the  
 2 mortgagee.” *Miller v. Provost*, 26 Cal. App. 4th 1703, 1707 (1994). “The cloud upon [one’s]  
 3 title persists until the debt is paid.” *Aguilar v. Bocci*, 39 Cal. App. 3d 475, 477 (1974).  
 4 Accordingly, “[i]n order to allege a claim to quiet title, Plaintiff must allege tender or offer of  
 5 tender of the amounts borrowed.” *Ricon v. Recontrust Co.*, No. 09cv937, 2009 WL 2407396,  
 6 at \*6 (S.D. Cal. Aug. 4, 2009); *see Arnolds Mgmt. Corp. v. Eischen*, 158 Cal. App. 3d 575, 578  
 7 (1984); *Karlsen*, 15 Cal. App. 3d at 117-18.

8 As discussed above, Plaintiffs fail to adequately allege an ability to tender. *See Iqbal*,  
 9 129 S. Ct. at 1950. The Motions to Dismiss are granted as to the fourteenth cause of action for  
 10 quiet title.

## 11 **12. Injunctive Relief and Rescission**

12 The moving Defendants move for the dismissal of the fifteenth cause of action for  
 13 injunctive relief and the sixteenth cause of action for rescission on the basis that they are  
 14 remedies and not a causes of action.

15 Under California law, injunctive relief “is a remedy and not, in itself, a cause of action,  
 16 and a cause of action must exist before injunctive relief may be granted.” *Shell Oil Co. v.*  
 17 *Richter*, 52 Cal. App. 2d 164, 168 (1942) (citation omitted); *see also Vissuet v. Indymac Mortg.*  
 18 *Servs.*, No. 09cv2321, 2010 WL 1031013, at \*7 (S.D. Cal. Mar. 19, 2010) (same); *Jozinovich*  
 19 *v. JP Morgan Chase Bank, N.A.*, No. C-09-3326, 2010 WL 234895, at \*7 (N.D. Cal. Jan. 14,  
 20 2010) (“Rescission is not an independent cause of action, but rather a remedy.”).

21 The Motions to Dismiss are granted as to the fifteenth cause of action for injunctive  
 22 relief and the sixteenth cause of action for rescission.

## 23 **13. Accounting**

24 The moving Defendants move for the dismissal of the seventeenth cause of action for  
 25 an accounting on the basis that it is not adequately pled because “Plaintiffs do not allege that  
 26 there is a balance due to Plaintiffs on the underlying loan.” (ECF No. 100 at 30).

27 Under California law, an accounting is generally a remedy under equity. *See Batt v.*  
 28 *City & County of San Francisco*, 155 Cal. App. 4th 65, 82 (2007). In certain cases, an

1 accounting can be a cause of action. “A cause of action for an accounting requires a showing  
 2 that a relationship exists between the plaintiff and defendant that requires an accounting, and  
 3 that some balance is due the plaintiff that can only be ascertained by an accounting.” *Teselle*  
 4 *v. McLoughlin*, 173 Cal. App. 4th 156, 179 (2009) (citations omitted).

5 Plaintiffs fails to allege that “some balance is due the plaintiff.” *Id.* Accordingly,  
 6 Plaintiffs have failed to allege an essential element of a cause of action for an accounting. The  
 7 Motions to Dismiss are granted as to the seventeenth cause of action for an accounting.

#### 8 **14. California Business and Professions Code § 17200**

9 The ninth cause of action in the First Amended Complaint alleges violation of  
 10 California Business and Professions Code § 17200.

11 The moving Defendants first move to dismiss this cause of action on the basis that  
 12 “unfair practices under Section 17200 applies to ongoing conduct, and relief is not available  
 13 to remedy past conduct. Because Plaintiffs’ allegations with this cause of action refer to past  
 14 conduct by parties other than Defendants, they do not meet the requirement set forth in Section  
 15 17200.” (ECF No. 100 at 23 (citing *Mangini v. Aerojet-General Corp.*, 230 Cal. App. 3d  
 16 1125, 1155-56 (1991)). This contention relies on a prior version of the unfair competition  
 17 statute. In 1992, the California legislature amended § 17200 to expand the definition of unfair  
 18 competition to include “any unlawful, unfair or fraudulent business *act* or practice.” Cal. Bus.  
 19 & Prof. Code § 17200 (emphasis added). The California Supreme Court has interpreted the  
 20 1992 amendment as overruling prior court precedent that required an ongoing pattern of  
 21 conduct. *See Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 570 (1998).  
 22 “[U]nder the current version of the statute, even a single act may create liability.” *United*  
 23 *Farm Workers of Am., AFL-CIO v. Dutra Farms*, 83 Cal. App. 4th 1146, 1163 (2000); *see also*  
 24 *CRST Van Expedited, Inc. v. Werner Enter., Inc.*, 479 F.3d 1099, 1107 (2007) (“A business act  
 25 or practice need not be an ongoing pattern of conduct.”).

26 The moving Defendants also contend that “this cause of action does not indicate that  
 27 Plaintiffs have *actually* been damaged by the alleged conduct.” (ECF No. 100 at 23-24  
 28 (emphasis in original)). The Court finds that the First Amended Complaint adequately alleges




1 that Plaintiffs have been damaged by the alleged conduct of Defendants. (ECF No. 90 at 16-  
2 17, 36).

3 California Business and Professions Code § 17200 “borrows violations of other laws  
4 and treats” them as unlawful business practices “independently actionable under section  
5 17200.” *Farmers Ins. Exch. v. Superior Court*, 2 Cal. 4th 377, 383 (1992) (quotation omitted).  
6 “Violation of almost any federal, state, or local law may serve as the basis for a[n] [unfair  
7 competition] claim.” *Plascencia v. Lending 1st Mortg.*, 583 F. Supp. 2d 1090, 1098 (N.D. Cal.  
8 2008) (citing *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838-39 (1994)). The Court  
9 has found that the Motion to Dismiss should be denied as to the intentional misrepresentation,  
10 negligent misrepresentation, and promissory estoppel claims against Select Portfolio Servicing.  
11 To the extent Plaintiffs’ § 17200 claim is predicated on the intentional misrepresentation,  
12 negligent misrepresentation, and promissory estoppel claims against Select Portfolio Servicing,  
13 the Motion to Dismiss Plaintiffs’ § 17200 claim against Select Portfolio Servicing is denied.  
14 Otherwise, the Motions to Dismiss are granted as to Plaintiffs’ § 17200 claim.

15 **III. Conclusion**

16 IT IS HEREBY ORDERED that the Motion to Dismiss filed by Lender Processing  
17 Services, Inc. (ECF No. 97) is GRANTED, and the Motion to Dismiss filed by U.S. Bank  
18 National Association, Credit Suisse Financial Corporation, Select Portfolio Servicing, and  
19 Mortgage Electronic Registration Systems (ECF No. 100) is GRANTED in part and DENIED  
20 in part, as discussed above. All claims against Lender Processing Services, Inc., U.S. Bank  
21 National Association, Credit Suisse Financial Corporation, and Mortgage Electronic  
22 Registration Systems are dismissed without prejudice. All claims against Select Portfolio  
23 Servicing are dismissed without prejudice, except the intentional misrepresentation, negligent  
24 misrepresentation, promissory estoppel, and § 17200 claims. The moving Defendants’ request  
25 for an award of attorneys’ fees and costs is denied.

26 DATED: September 13, 2011

27   
28 **WILLIAM Q. HAYES**  
United States District Judge